Aeon Co (M) Bhd v Asia Plywood Co Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-03(IM)(NCVC)-30–04 OF 2019 AND W-03(IM)(NCVC)-32–04 OF 2019
KAMARDIN HASHIM, AZIZAH NAWAWI AND MOHD SOFIAN JJCA
9 DECEMBER 2020

Damages — Assessment — Appeal — Whether High Court judge rightly allowed appeal against deputy registrar's decision not to award any damages to plaintiff at hearing of assessment of damages — High Court judge had earlier allowed plaintiff's application to remove defendant's private caveat on its land and found defendant liable to pay damages to plaintiff under s 329(1) of National Land Code — Court ordered deputy registrar ('DR') to assess the damages payable — Whether it was not competent for DR not to award plaintiff any damages on ground it had failed to prove its loss — Whether DR's duty was to assess the damages payable and to award nominal damages if quantum was not evidentially proven — Whether High Court judge on appeal had correctly assessed the damages payable to plaintiff

Pursuant to a sale and purchase agreement ('SPA'), Aeon Co (M) Bhd ('Aeon') agreed to buy a piece of agricultural land from Asia Plywood Co Sdn Bhd ('Asia Plywood'). The SPA contained certain conditions precedent that had to be fulfilled within a stipulated time failing which the parties were entitled to terminate the agreement by giving written notice whereupon, inter alia, the buyer was to withdraw any private caveat it had entered on the land. When Aeon failed to fulfill the conditions precedent with the given time, Asia Plywood gave notice that the agreement had lapsed and that it would not give any extension of time. Aeon, however, obtained a court order giving it an extension of six months to fulfill the conditions precedent. Despite the extension, Aeon could not fulfill the conditions precedent and its application to court for a further extension of time failed. Asia Plywood applied to the High Court to have Aeon's private caveat removed and for damages for Aeon's failure to remove the same. It was only while the said application was pending hearing that Aeon withdrew the caveat. The court nevertheless found that Aeon had allowed the caveat to remain on the land without reasonable cause and therefore had to pay damages to Asia Plywood under s 329 of the National Land Code ('the NLC'). The deputy registrar ('DR'), who was ordered to assess the damages, made no award after ruling that Asia Plywood had failed to prove its loss at the hearing of assessment of damages. On appeal, the judge-in-chambers set aside the DR's decision and awarded Asia Plywood RM2,410,074.53 in damages — the bulk of which (namely,

A RM2,310,805.53) comprised fixed deposit interest that it would have earned if its sale of the land to IPGB had gone through. The court also allowed the sum of RM99,269 which Asia Plywood had to pay as fees and disbursements to a valuer for valuing and preparing a valuation report on the land. Asia Plywood's claim for diminution in the value of the land was refused. In the instant appeals B against the decision, Aeon maintained that the DR's decision was correct and should be upheld while Asia Plywood argued that apart from rightly allowing its appeal against the DR's decision, the judge-in-chambers should also have allowed its claim for diminution in the value of the land. With regard to its claim for damages, Asia Plywood argued that if not for Aeon's caveat it would C have sold the land to IPGB by 8 August 2014 for RM52,690,560 whereupon it would have received 8% of that sum as deposit upon signing of the SPA and received the balance 90% of the purchase price by December 2014. Applying the then fixed deposit interest rate of 3.1%pa to the receipt of those monies, D Asia Plywood would have earned a total interest of RM2,310,805.53 until the date the caveat was withdrawn. The claim for diminution in the value of the land was based on the difference between the market value of the land and the higher purchase price that IPGB had offered for it. After IPGB refused to proceed with the SPA (on account of the existence of the private caveat) there E were no other interested buyers for the land.

Held, unanimously dismissing both the appeals:

(1) Under O 37 r 1 of the Rules of Court 2012, pursuant to which the assessment of damages in the instant case was carried out, the DR had to F certify the amount of damages payable; the provision did not provide for the dismissal of a claim for damages after the completion of the evidentiary hearing. The Court of Appeal in *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Datul Khusus & Anor* G [2008] 4 MLJ 157 held that once a party was held entitled to recover damages, what followed was an exercise for the assessment of those damages. If at that stage, the party could not evidentially establish the measure of damages suffered, nominal damages would be awarded. Hence, in the present case, the High Court was correct in reversing the H finding of the DR that Asia Plywood had failed to prove the loss and damage it suffered (see para 33).

(2) Based on the evidence, the trial judge was correct in holding that IPGB as the prospective buyer was willing to buy the land at RM60 per sqft. The evidence clearly showed that there was no other prospective buyer as at 3 I May 2016 because of the poor market sentiments. The evidence also showed that the offer of RM60 per sqft was made on the basis the land would be converted for commercial use and a feasibility study showed that at that price IPGB could still make a reasonable profit from the purchase and development of the land. Hence, the price which IPGB had

offered ought to be accepted as the best reflection of the true commercial or market value of the land (see paras 49–52).

(3) There was no manifest error in the manner in which the trial judge had determined the quantum of damages payable to Asia Plywood whose calculation of loss was accepted by the trial judge in the absence of rebuttal evidence from Aeon as to what would otherwise have been the appropriate bank interest rate at the material time (see paras 56–57).

(4) The damages claimed by Asia Plywood was not a cause of action in tort but one premised on a statutory remedy under s 329(1) of the NLC whose purpose was to compensate the party that had suffered damages and not to unjustly enrich the party. Since the court had allowed Asia Plywood's claim on interest that it could have earned but for the private caveat, it was only fair to disallow the claim for diminution in the value of the land. There was no manifest error in the High Court's findings in this regard (see paras 60–61).

(5) The High Court had properly allowed the sum of RM99,269 claimed as fees and disbursements by the party that had valued and prepared a valuation report on the land (see para 62).

[Bahasa Malaysia summary

Menurut perjanjian jual beli ('PJB'), Aeon Co (M) BHD ('Aeon') telah bersetuju untuk membeli sebidang tanah pertanian daripada Asia Plywood Co Sdn Bhd ('Asia Plywood'). PJB tersebut mengandungi prasyarat tertentu yang perlu dipenuhi dalam masa yang ditetapkan dan jika gagal pihak-pihak berhak menamatkan perjanjian tersebut dengan memberi notis bertulis yang mana, antara lain, pembeli hendaklah menarik balik kaveat persendirian yang dimasukkannya ke atas tanah tersbeut. Apabila Aeon gagal untuk memenuhi prasyarat tersebut dengan masa yang ditetapkan, Asia Plywood telah memberi notis bahawa perjanjian tersebut telah luput dan bahawa ia tidak memberi apa-apa lanjutan masa. Aeon, bagaimanapun, telah memperoleh perintah mahkamah memberikannya lanjutan enam bulan untuk memenuhi prasyarat tersebut. Walau pun terdapat lanjutan tersebut, Aeon masih tidak dapat memenuhi prasyarat itu dan permohonannya kepada mahkamah untuk lanjutan masa selanjutnya telah gagal. Asia Plywood telah memohon kepada Mahkamah Tinggi untuk mengeluarkan kaveat persendirian Aeon dan untuk ganti rugi kerana kegagalan Aeon untuk mengeluarkan kaveat itu. Ia hanya pada masa permohonan tersebut masih menunggu perbicaraan yang Aeon telah menarik balik kaveat itu. Mahkamah walau apapun telah mendapati bahawa Aeon telah membenarkan kaveat itu kekal atas tanah tersebut tanpa sebab munasabah dan oleh itu hendaklah membayar ganti rugi kepada Asia Plywood di bawah s 329 Kanun Tanah Negara ('Kanun tersebut'). Timbalan pendaftar ('TP'), yang telah diperintahkan untuk mentaksir ganti rugi tersebut, tidak membuat award selepas keputusan bahawa Asia Plywood telah

gagal untuk mebuktikan kerugiannya semasa perbicaraan taksiran ganti rugi. Atas rayuan, hakim dalam kamar telah mengetepikan keputusan TP dan mengawardkan Asia Plywood ganti rugi sejumlah RM2,410,074.53 — sebahagian besarnya yang mana (iaitu, RM2,310,805.53) terdiri daripada faedah deposit tetap yang ia akan peroleh jika jualan tanahnya kepada IPGB telah berlaku. Mahkamah juga membenarkan jumlah RM99,269 yang telah dibayar oleh Asia Plywood sebagai fi dan pendahuluan kepada penilai untuk menilai dan menyediakan laporan penilaian ke atas tanah tesebut. Tuntutan Asia Plywood untuk pengurangan dalam nilai tanah tersebut telah ditolak. Dalam rayuan-rayuan ini terhadap keputusan tersebut, Aeon menegaskan bahawa keputusan TP adalah wajar dan patut dikekalkan manakala Asia Plywood berhujah bahawa selain daripada sewajarnya membenarkan rayuannya terhadap keputusan TP tersebut, hakim dalam kamar juga patut membenarkan tuntutannya untuk pengurangan dalam nilai tanah tersebut. Berdasarkan tuntutannya untuk ganti rugi, Asia Plywood berhujah bahawa jika bukan kerana kaveat Aeon ia akan menjual tanah tersebut kepada IPGB sebelum atau pada 8 Ogos 2014 untuk RM52,690,560 yang mana ia akan menerima 8% daripada jumlah tersebut sebagai deposit selepas menandatangani PJB tersebut dan menerima baki 90% harga belian pada Disember 2014. Dengan mengguna pakai kadar faedah deposit tetap pada masa itu iaitu 31% setiap tahun untuk penerimaan wang tersebut, Asia Plywood akan memperoleh jumlah faedah RM2,310,805.53 sehingga tarikh kaveat ditarik balik. Tuntutan untuk pengurangan dalam nilai tanah tersebut adalah berdasarkan perbezaan antara nilai pasaran tanah tersebut dan harga belian lebih tinggi yang ditawarkan oleh IPGB untuknya. Selepas IPGB enggan untuk meneruskan dengan PJB tersebut (berdasarkan kewujudan kaveat persendirian itu) maka tiada pembeli lain yang berminat dengan tanah itu.

Diputuskan, sebulat suara menolak kedua-dua rayuan:

(1) Di bawah A 37 k 1 Kaedah-Kaedah Mahkamah 2012, menurut pentaksiran ganti rugi dalam kes ini dijalankan, TP hendaklah mengesahkan jumlah ganti rugi yang kena dibayar; peruntukan itu tidak memperuntukkan untuk penolakan tuntutan ganti rugi selepas selesai perbicaraan keterangan. Mahkamah Rayuan dalam kes *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Datul Khusus & Anor* [2008] 4 MLJ 157 telah memutuskan bahawa apabila satu pihak telah diputuskan untuk mendapat balik ganti rugi, apa yang berlaku berikutan itu adalah satu amalan untuk pentaksiran ganti rugi tersebut. Jika pada peringkat tersebut, pihak itu tidak dapat membuktikan keterangan jumlah ganti rugi yang dialami, ganti rugi nominal akan diawardkan. Justeru, dalam kes ini, Mahkamah Tinggi adalah wajar dalam mengakas dapatan TP bahawa Asia Plywood telah

gagal untuk membuktikan kerugian dan kehilangan yang dialaminya (lihat perenggan 33).

(2) Berdasarkan keterangan, hakim perbicaraan adalah betul dalam memutuskan bahawa IPGB sebagai bakal pembeli sanggup membeli tanah tersebut pada RM60 setiap kaki persegi. Keterangan jelas menunjukkan bahawa tiada bakal pembeli lain setakat 3 Mei 2016 kerana sentiment pasaran yang teruk. Keterangan juga menunjukkan bahawa tawaran RM60 setiap kaki persegi telah dibuat berasaskan tanah itu boleh ditukarkan kepada penggunaan komersial dan kajian kebolehlaksanaan menunjukkan bahawa pada harga tersebut IPGB masih boleh membuat keuntungan yang munasabah daripada belian dan pembangunan tanah tersebut. Justeru, harga yang ditawarkan oleh IPGB patut diterima sebagai gambaran terbaik nilai pasaran atau komersial sebenar tanah tersebut (lihat perenggan 49–52).

(3) Tiada kesilapan ketara dalam cara hakim perbicaraan telah menentukan kuantum ganti rugi yang kena dibayar kepada Asia Plywood yang mana pengiraan kerugian telah diterima oleh hakim perbicaraan dengan tiada keterangan bantahan daripada Aeon berhubung apa yang sebaliknya kadar faedah bank yang sesuai pada masa matan (lihat perenggan 56–57).

(4) Ganti rugi yang dituntut oleh Asia Plywood bukan kausa tindakan dalam tort tetapi yang berpremiskan remedi statutori di bawah s 329(1) Kanun tersebut yang bertujuan untuk memberi pampasan kepada pihak yang mengalami kerugian dan bukan secara tidak adil menguntungkan pihak tersebut. Oleh kerana mahkamah telah membenarkan tuntutan berhubung faedah Asia Plywood itu yang mungkin dapat diperolehinya jika bukan kerana kaveat persendirian itu, ia hanya adil untuk tidak membenarkan tuntutan untuk pengurangan dalam nilai tanah tersebut. Tiada kesilapan ketara dalam dapatan Mahkamah Tinggi berkenaan ini (lihat perenggan 60–61).

(5) Mahkamah Tinggi telah membenarkan dengan sewajarnya jumlah RM99,269 dituntut sebagai fi dan pendahuluan oleh pihak yang tleah menilai dan menyediakan laporan penilaian ke atas tanah tersebut (lihat perenggan 62).]

Cases referred to

Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor [2007] 5 MLJ 685, HC (refd)

Hollebone v Midhurst and Fernhurst Builders Ltd [1968] 1 Lloyd's Rep 38, QBD (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Lau Foo Sun v Govt of Malaysia [1970] 2 MLJ 70, FC (refd)

Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)

Milik Perusahan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6, CA (refd)
Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Ting Sieh Chung v Hock Peng Realty Sdn Bhd [2013] 2 MLJ 90, CA (refd)

Legislation referred to

National Land Code s 329, 329(1)
Rules of Court 2012 O 34, O 37 r 1

Appeal from: Originating Summons No 24NCVC-1425–09 of 2014 (High Court, Kuala Lumpur)

Doshi Jyotsana (R Jayasingam and Ng Keng Yang with him) (BH Lawrence & Co) for the appellant.
Lim Choon Khim (Chin Yan Leng and David Yii with him) (Chooi, Saw & Lim) for the respondent.

Mohd Sofian JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two separate appeals before this court emanating from the decision of the High Court dated 22 March 2019, namely:

(a) in Civil Appeal No W-03(IM)(NCVC)-30–04 of 2019, the appellant is the first defendant in the High Court and the respondent is the plaintiff. The appellant is appealing against the whole of the decision of the learned judicial commissioner setting aside the decision of the learned deputy registrar and awarding damages, interest and cost to the respondent; and

(b) in Civil Appeal No W-03(IM)(NCVC)-32–04 of 2019, the appellant is the plaintiff and the respondent is the first defendant. The appellant is appealing against part of the decision the learned judicial commissioner disallowing the appellant's claim for diminution of the value of the land in the amount of RM9,190,560.

[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

[3] Having considered the appeal records and the submissions of the parties in these appeals, it is our unanimous decision that both appeals be dismissed with cost to be borne by each party.

BACKGROUND FACTS

[4] On 3 June 2011, both the plaintiff and the first defendant had entered into a sale and purchase agreement ('the SPA') whereby the plaintiff agreed to sell to the first defendant a piece of freehold land held under GRN 181086 ('the said land') with the purchase price of RM36,019,241.28 for the purpose of operating the business of shopping centres and departmental stores but subjected to conditions precedent set out in paras (a)–(f) of cl 2.1 of the SPA.

[5] Clause 2.2 stated the consequences of such non-fulfilment whereby upon the expiry of the conditional period or such other mutually extended period, either party shall be entitled to terminate the agreement by serving a written notice. Upon receipt of such notice:

(a) the plaintiff shall refund or cause to be refunded the first defendant all monies paid with interest accrued; and

(b) in exchange thereof, the first defendant shall withdraw any private caveat or other encumbrances at their own cost and expenses.

[6] On 4 July 2011, the first defendant entered a private caveat against the title to the plaintiff's land ('the private caveat').

[7] Unfortunately, the conditions precedent in the SPA could not be fulfilled in time. The plaintiff then issued a letter to the first defendant stating that the agreement has lapsed and refused for the extension.

[8] In reaction to that, the first defendant took out an Originating Summons No 24NCC-375–10 of 2012 for a decree of a specific performance of the SPA ('SP suit'), which had been allowed by the court on 2 September 2013, whereby the court allowed a conditional decree for specific performance by granting an extension of six months for the first defendant to fulfill the conditions precedent. Under the terms of the order in the SP suit, the court further stated that if the first defendant fails to fulfill the conditions precedent by 2 March 2014, the agreement would lapse and become void.

[9] However, the first defendant failed to fulfil the conditions precedent and applied to the court for further extension. On 7 July 2014, the first defendant's application for an extension of time was dismissed. The first defendant appealed against this decision.

[10] The first defendant had also refused to have the private caveat withdrawn.

[11] Therefore, in September 2014, the plaintiff filed an Originating Summons No 24NCC-1425–09 of 2014 ('OS1425') under O 37 r 1 of the Rules of Court 2012 ('the ROC 2012') to have the private caveat removed together with other ancillary reliefs.

[12] On 8 December 2014, the first defendant took out another application in the SP suit for a further extension of time of the SPA. However, such application had been dismissed by the court on 15 January 2015 with cost. The first defendant appealed against this decision.

[13] On 29 March 2016, the Court of Appeal dismissed with costs both of the aforesaid appeals filed by the first defendant. Despite of this decision, the first defendant continued to maintain the private caveat.

[14] It was only until the case management of OS1425 on 3 May 2016, that the first defendant represented to the learned judge that they will withdraw the private caveat. The private caveat was withdrawn by the first defendant on 3 May 2016.

[15] The learned judge in OS1425 proceeded to hear the plaintiff's application pursuant to s 329 of the National Land Code (Act 56 of 1965) ('the NLC') for damages against the first defendant.

[16] On 5 August 2016, the court allowed the plaintiff's prayer for damages and had made an order against the first defendant upon a finding that the first defendant had no reasonable cause of action to maintain its private caveat on the plaintiff's land and that the legal requirement under s 329 of the NLC have been fulfilled. Besides, the learned judge found that there was prima facie evidence of loss or damage.

[17] The order of the High Court on 5 August 2016 was as follows:

(a) Bahawa satu perintah ganti rugi terhadap defendant pertama diberikan dan ganti rugi tersebut ditafsirkan di hadapan Timbalan Pendaftar; dan

(b) Bahawa Defendan Pertama hendaklah membayar kos sebanyak RM7,500.00 kepada Plaintiff.

(c) Fi alokatur adalah sebanyak 4% daripada jumlah kos.

[18] Thus, aggrieved by the decision of the High Court, the first defendant appealed against such decision and on 30 March 2017, the Court of Appeal upheld the decision of the High Court but varied the order to the extent that the damages was to be assessed for the period between 8 August 2014 and 3 May 2016.

[19] The assessment of damages was then heard by the learned deputy registrar through oral and documentary evidence of witnesses.

[20] In the proceeding before the learned deputy registrar, three issues had been identified as follows:

(a) whether the plaintiff had suffered loss;

(b) whether the plaintiff had calculated a proper sum/figure for the loss; and

(c) whether the plaintiff is entitled to claim for diminution of value of the said land.

[21] On 16 August 2018, the learned deputy registrar found that the plaintiff failed to prove the loss allegedly suffered and no award of damages was made. Each party was ordered to bears their own costs.

[22] Being dissatisfied with the decision of the learned deputy registrar, the plaintiff appealed to the learned judge in chambers vide a notice of appeal dated 24 August 2018.

[23] On 22 March 2019, the learned judge allowed the plaintiff's appeal and set aside the decision of the learned deputy registrar and awarded the sum of RM2,410,074.53 as damages to the plaintiff with costs of RM20,000 to the plaintiff for the proceeding before the learned deputy registrar and also the appeal. The learned judge also allowed the expenses awarded in obtaining the valuation report of the property being the professional fee and reimbursement as per the invoice of Henry Butcher Malaysia (Kedah) Sdn Bhd dated 11 May 2017 in the sum of RM99,269. The learned judge also allowed the claim for interest at the rate of 3.1%pa as at July 2014 in the sum of RM2,310,805.53 which could have been earned on the sale of the said land to IPGB but for the private caveat. The plaintiff's claim for diminution of the value of the land was not allowed. In this regard, the plaintiff's claim for diminution of the value is premised on a statutory remedy under sub-s 329(1) of the NLC. Thus, the purpose of damages in present context is to compensate the plaintiff and not to cause an unjust enrichment to the plaintiff.

[24] Both the plaintiff and the first defendant appealed against the said order of the High Court.

THE APPEAL

[25] The first appeal is premised on the following grounds:

(a) that the court had erred in law and in fact by failing to consider or give proper and due judicial consideration to the relevant facts, and considered irrelevant facts, in arriving at the decision;

(b) that the court had erred in law and/or in fact in reversing the decision of the deputy registrar dated 16 August 2018. In this regard:

(i) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the deputy registrar has made the decision dated 16 August 2018 after a thorough trial involving six witnesses and *viva voce* evidence for the assessment of damages; and

(ii) that the court had erred in law and/or in fact in failing to consider that the deputy registrar has not committed any manifest error in arriving at the decision;

(c) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the plaintiff has failed to prove real and actual loss. In this regard:

(i) that the court had erred in law and/or in fact in failing to determine/consider and/or appreciate the fact that there was no evidence of any property value loss or any other loss being suffered by the plaintiff which required a monetary award as compensation pursuant to s 329 of the NLC;

(ii) that the court had erred in law and/or in fact in failing to determine/hold that the plaintiff's own valuer has established and proved that the price of the said land has appreciated in value;

(iii) that the court had erred in law and/or in fact in failing to recognise/appreciate that the subject land is an agricultural land at all material times and that the plaintiff had in fact had no prospective buyer or prospective purchaser to purchase the said land at the price as alleged or claimed by the plaintiff;

(iv) that the court had erred in law and/or in fact in failing to recognise/take cognisance of the fact that purported potential purchaser has clearly admitted that they would not pay RM60 per sqft for agricultural land;

(v) that the court had erred in law and/or in fact in failing to consider that the plaintiff has not adduced any evidence and/or failed to adduce any evidence to show that there is any potential purchaser who is willing to buy the agricultural land at the material time;

(vi) that the court had erred in law and/or in fact in failing to take into account the fact that in light of the price of the subject land having appreciated in value that no monetary sum ought to be awarded to

the plaintiff and/or in the circumstances of this case and taking into account the evidence adduced (at the hearing of the assessment of damages) any award of a monetary sum to the plaintiff would amount to an unjust enrichment in that the plaintiff would be making a profit which would run contrary to the concept of 'compensation' as envisaged by s 329 of the NLC;

(d) that the court had erred in law and/or in fact in failing to consider that the plaintiff had in fact not offered the said land for sale after the private caveat was removed which showed that the plaintiff had not established any loss for which the compensation would be payable pursuant to s 329 of the NLC;

(e) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the award of the damages of RM2,410,074.53 to the plaintiff is in fact enriching or conferring an additional benefit on the plaintiff at the expense of the first defendant looking at the fact that the said land has appreciated in value; and

(f) that the court had erred in law and/or in fact in holding that the decision made by the High Court on the 5 August 2016 and based the grounds of the said decision stating that there was 'prima facie' evidence of loss should or ought to be interpreted to mean that a monetary sum ought to be awarded to the plaintiff even if the plaintiff had not led any evidence and/or any credible evidence of loss.

[26] In the second appeal, the plaintiff's claim for the diminution of the value of the land ought to be allowed as the plaintiff has proved at the evidentiary hearing that as at 3 May 2016 there was no longer any prospective buyer for the said land. Besides, the claim for diminution did not overlap with the court's award of damages on interest loss. The former relates to the decline of the property value whilst the latter relates to the loss of use of money had the land been sold at RM60 sqft at the material time.

OUR DECISION

[27] Pursuant to the order of the High Court dated 5 August 2016 and the order of this court dated 30 March 2017 which ordered that an assessment of damages against the first defendant be held before the learned deputy registrar, on 16 August 2018 the plaintiff's application for assessment of damages was dismissed and each party was to bear its own cost.

[28] The said order for an assessment of damages against the first defendant was made pursuant to s 329 of the NLC when the court held that the first defendant had no reasonable cause of action to maintain the private caveat on the plaintiff's land.

[29] Section 329 of the NLC states as follows:

> 329 Compensation for wrongful caveats, and limitation on repeated applications.
>
> (1) Any person or body who, or without reasonable cause , secures the entry of, or fails to withdraw , any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[30] The assessment of damages before the deputy registrar is pursuant to O 37 r 1 of the ROC 2012 which reads as follows:

> 1 Assessment of damages by Registrar (O 37 r 1)
>
> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, shall within one month from the date of judgment, apply to the Registrar for directions and the provisions of O 34 shall, with the necessary modifications, apply.

[31] It is pertinent to note that the plaintiff's application for assessment of damages was dismissed by the deputy registrar on the basis that the plaintiff had failed to prove the loss allegedly suffered.

[32] Aggrieved by the said decision, the plaintiff appealed to the High Court.

[33] In our view under O 37 r 1 of the ROC 2012, the learned deputy registrar was to certify the amount of damages and it does not provide for the dismissal of a claim for damages after the completion of the evidentiary hearing. In *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157, Gopal Sri Ram JCA (as he then was) held that once it is held that the party is entitled to recover damages, what follows is an exercise of the assessment of those damages. If at that stage he or she is unable to evidentially establish the measure of damage suffered, nominal damages will be awarded. Hence we are of the view that the learned judge was correct in reversing the finding of the deputy registrar that the plaintiff had failed to prove the loss and damage suffered.

[34] It is trite law that specific finding of facts by the deputy registrar as a trier of facts should not be disturbed by the High Court unless that finding was plainly wrong in light of the facts in the assessment of damages, as the deputy registrar had the benefit of an audio-visual advantage which the High Court did not have (see Low Hop Bing JCA in *Ting Sieh Chung v Hock Peng Realty Sdn Bhd* [2013] 2 MLJ 90 at pp 93–94).

[35] We find that the learned judge had sieved through the evidence and assess the quantum after having decided to set aside the decision of the deputy registrar.

[36] In *Milik Perusahan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6 the Court of Appeal held that ' ... the principles governing an appeal from a registrar to a judge in chambers are now no different from those governing an appeal from a trial on merits from the High Court to this court. On such an appeal to this court, fresh evidence is not admissible unless the conditions set out in *Ladd v Marshall* [1954] 3 All ER 745 are met (see *Lau Foo Sun v Govt of Malaysia* [1970] 2 MLJ 70)'.

[37] The author of *Land Law in Malaysia: Cases and Commentary* (3rd Ed, Lexis Nexis, 2012) at pp 732–733 — Teo Keang Sood and Khaw Lake Tee states as follows:

> A claimant relying on sub-s 329(1) of the NLC thus has to prove that: (i) the private caveat entered by the defendant was entered wrongfully or without reasonable cause; and (ii) that claimant had suffered damages or losses as a result of the lodgment of the private caveat. In assessing damages for such wrongful entry of a caveat, real and actual loss must be prove as opposed to what might have been the loss or damage. Compensation under sub-s 329(1) of the NLC can only be awarded for actual damages which were reasonably foreseeable.

[38] The first issue to consider is whether the plaintiff had succeeded in proving as a result of the wrongful entry of the private caveat by the first defendant, had resulted in loss and damage to the plaintiff.

[39] The second issue to consider is whether the computation of the loss incurred by the plaintiff was correct.

[40] The third issue to consider is whether the plaintiff is entitled to claim for diminution of value of the said land.

ON THE FIRST ISSUE

[41] It was the contention of the learned counsel for the defendant that the learned judge had erred in making the order dated 22 March 2019 awarding the sum of RM2,410,074.53 with interest to the plaintiff which is made up of RM2,310,805.53 based on fixed deposit interest rate. The court has also awarded the sum of RM99,269 being the fees for the professional valuer engaged by the plaintiff.

[42] It is further contended that the sum of RM2,310,805.53 as interest was derived at by calculating 8% of the purchase price at RM60 per sqft as

submitted by the plaintiff which is based on reliance on the offer made by Ivory Properties Group Bhd's letter dated 21 July 2014. The contents of the said letter indicated that the said offer is 'subject to terms and conditions and further negotiation'.

[43] For ease of reference the content of the said letter is reproduced herewith:

> Our Ref: IPGB/EDbid/CA/LOI/3763
>
> 21 July 2014
>
> EDBID Properties Sdn Bhd,
>
> No 152 Jalan Gurdwara,
>
> 10300 Penang,
>
> (Attention Ms Ann Lee)
>
> Dear Ms Ann Lee
>
> LETTER OF INTENT
>
> PURCHASE OF PREMISES KNOWN AS LOT 2834, SEKSYEN 47, DAERAH KUALA MUDA, MUKIM BANDAR PETANI, KEDAH (LAND ABOUT 8.162 HECTRES) ('LAND')
>
> We refer to the subject matter and the conversation earlier, we would like to extend our interest to make initial offer of RM60 sqft subject always to the terms and conditions and further negotiation.
>
> We look forward to hearing the feedback from you sooner possible.
>
> Thank you in advance.
>
> Yours faithfully,
>
> Ivory Properties Group Berhad Lee Chin Aik,
>
> PA to Group CEO.

[44] The learned counsel further argued that whether the offer of RM60 sqft was a firm offer from prospective purchaser. It was the contention of learned counsel that the evidence showed that the price of RM60 sqft was for land converted to commercial use. The witness for the plaintiff namely PW2 had explained that he would not offer RM60 sqft for the subject land which is categorised for agriculture use. It was further argued that the price of RM60 sqft was for land converted to commercial use.

[45] The learned judge had in her grounds of judgment opined that the plaintiff had suffered loss because no sale and purchase agreement could be signed between the plaintiff and IPGB in the period from 8 August 2014 to 3 May 2016 because of the existence of the private caveat.

[46] On being informed that the private caveat was still lodged on the said land, IPGB would still be prepared to purchase the said land if the private caveat could be removed in three months' time. However, when PW1 told PW2 that it was uncertain when the private caveat could be removed, IPGB decided to discontinue its attempt to purchase the said land.

[47] In the witness statement of PW2 which stated as follows:

> I discussed with Dato' Low. He then decided that there was no point waiting because we wanted to tap on the property market while it was still strong. This is because the economy would be bad in the near future. So I went ahead and told Ann Lee that Ivory would no longer continue with negotiation.

[48] It was further stated by PW2 whether IPGB is still willing to purchase the said land at RM60 sqft to which PW2 replied 'of course not the property market has showed down substantially. It would be risky to pay that price now.'

[49] Based on the above evidence, we are of the considered view that the learned judge was correct to state that IPGB as the prospective purchaser was willing to purchase the said land at RM60 sqft. The evidence clearly showed that there was no other prospective purchaser as at 3 May 2016 because of the poor market sentiments. Further, PW4 opined that as at 3 May 2016, the said land could only fetch a price of either RM33.6m if the said land remains as agriculture land or RM43.5m if it is converted for commercial use.

[50] During re-examination of PW2, she clarified that in 2014, the offer of RM60 sqft was on the basis that the said land would be commercialised and the feasibility study showed that it was profitable and feasible for that price of RM60 sqft and could still make a reasonable profit.

[51] We are in agreement with the learned judge that PW2's evidence in totality show that the offer of RM60 sqft made by IPGB following a feasibility study the company could still make a reasonable profit from the purchase and development of the said land. As part of the agreement IPGB would have asked the plaintiff to convert the category of use of the said land from agriculture to commercial.

[52] The price which the prospective purchaser ('IPGB') had offered ought to be accepted as the best reflection of the true commercial or market value of the said land.

[53] In *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662, this court held that:

The true commercial value of a property is not what any valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market.

[54] In *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685 the High Court referred to *Malayan Banking Bhd v Lim Poh Ho & Anor* and held as follows:

> [31] Further and/or in any event, the true market value of the said land could be better observed from the value attached to them by prospective purchasers as opposed to valuers. In this respect, reference is made to the decision of the Court of Appeal in *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 wherein it was held that:
>
> > ... the true commercial value of a property is not what a valuer thought it should be, but the actual price that the property would fetch on the open market

ON THE SECOND ISSUE

[55] The learned judge in her GOJ had stated that the sum of RM2,410,074.53 was with interest of which the sum of RM2,310,805.53 is on account of fixed deposit interest rate of 3.1%pa as at July 2014.

[56] Her Ladyship further held that there was no rebuttal evidence from the first defendant as to what would otherwise be the appropriate bank interest rate at the material time and accepted the calculation of the plaintiff stipulated as follows:

(a) if the first defendant had removed the private caveat, the plaintiff could have entered into a SPA with IPGB by 8 August 2014 for the price of RM52,690,560 (which is RM60 sqft), 10% of the said sum would have been received by the plaintiff upon signing of the agreement and 2% thereof would be paid to PW1 as commission whilst the balance 8% would be placed in a fixed deposit account with an interest rate of 3.1%pa;

(b) the balance 90% of the purchase price of RM47,421,504 would have been received by 8 December 2014 and this amount too would be deposited in a fixed deposit account to earn interest at the rate of 3.1%pa;

(c) interest which the plaintiff could have earned, namely:

(i) interest from 8% of the purchase price viz —
RM4,215,244.80 x 3.1% (from 8 August 2014 to 7 August 2015) = RM130,672.60
(RM4,215,244.80 + RM130,672.60 =RM4,345,917.40) x 3.1%/365 x 270 days (from 8 August 2015 to 3 May 2016) = RM99,658.40
Total : RM130,672.60 + RM99,658.40 = RM230,331

(ii) interest from 90% of the purchase price viz —
RM47,421,504 x 3.1% (from 8 December 2014 to 7 December 2015) = RM1,470,066.62

(RM47,421,504.00 + RM1,470,066.62 = RM48,891,570.62) x 3.1%/365 x 147 days (from 8 August 2015 to 3 May 2016) = RM610,407.91

Total : RM1,470,066.62 + RM610,407.91 = RM2,080,474.53

Thus, the total interest amounts to RM230,331 + RM2,080,474.53 = RM2,310,805.53.

[57] We are of the view that there is no manifest error in the above findings of the learned judge and affirmed with the said findings.

ON THE THIRD ISSUE

[58] The learned judge disallowed the claim for diminution of value of the said land in the sum of RM9.19m being the difference between price offered by IPGB of RM52.69m and the sum of RM43.5m as valued by PW4. Learned counsel for the plaintiff submitted that after the withdrawal of the private caveat on 3 May 2016 there were no offers to purchase the said land.

[59] In disallowing the plaintiff's claim for diminution of value of the said land, the learned judge distinguished the facts in the case referred to by the learned counsel in *Hollebone v Midhurst and Fernhurst Builders Ltd* [1968] 1 Lloyd's Rep 38 with the facts in the instant case. In *Hollebone*, the plaintiff's house caught fire due to the admitted negligence of a workman employed by the second defendant ie it was an action in tort. The second defendant admitted liability but contended that with regard to damage to the house, it should be based on the difference between the value before the fire and after the fire. After reviewing a number of English cases referred to him, the official referee held as follows:

> [1] that, on the facts of this case the plaintiffs' house was unique and plaintiffs acted reasonably in having damage made good; that those authorities relied on for the statement that measure of damage was not cost of reinstatement could be distinguished on their facts or conflicted with other authorities which were to be preferred where cost of repair or replacement was held to be the proper measure of damage; and that, therefore, in this case, correct measure of damages was cost of repair.

[60] Hence, in contrast, the damages claimed by the plaintiff herein is not a cause of action in tort but is premised on a statutory remedy provided under sub-s 329(1) of the NLC. Its purpose is to compensate the plaintiff and not to cause an unjust enrichment to the plaintiff. Since the court has allowed the plaintiff's claim on interest which it could have been earned but for the private

caveat, it is only fair that the claim for diminution of the value of the said land is disallowed.

[61] We are of the view that there is no manifest error in the above findings of the learned judge and affirmed the said findings.

[62] Last but not least, we agree that the cost incurred in obtaining a report and valuation of the property in the sum of RM99,269 being the professional fees and reimbursement as per the invoice by Henry Butcher Malaysia (Kedah) Sdn Bhd dated 11 May 2017 be allowed.

CONCLUSION

[63] Based on the reasons as adumbrated above and in all the circumstances, it is our unanimous decision that there is no merit in both the appeals. We dismiss both appeals and each party bears its own cost.

Appeals dismissed.

Reported by Ashok Kumar